IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER J. ANTHONY, Plaintiff, v. CELLCO PARTNERSHIP dba VERIZON, WIRELESS, Defendant.	2:09-cv-01024-GEB-KJM ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*

Defendant Cellco Partnership dba Verizon Wireless ("Verizon") moves for summary judgment on all claims in Plaintiff's complaint. Plaintiff alleges he was wrongfully terminated from Verizon on January 15, 2008, based on his disability and in retaliation for filing a California Family Rights Act ("CFRA") claim. Verizon argues Plaintiff was terminated for his inappropriate behavior at a company party on December 14, 2007.

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

I. STATEMENT OF UNCONTROVERTED FACTS

When Plaintiff was terminated he worked as an operations manager for Verizon in Rancho Cordova, California. (First Amended Compl. ("FAC") ¶ 1.) Plaintiff attended a Verizon Wireless dinner for members of the Rancho Cordova leadership team on Friday, December 14, 2007, at Rascal's restaurant. (Statement of Undisputed Facts ("SUF") ¶ 11.) Before going to the dinner at Rascal's, Plaintiff "went to a pub alone and consumed two beers". (Id. ¶ 12.) He then "drove himself to Rascal's and consumed one martini," and partially consumed one beer before dinner commenced. (Id. ¶ 13.) The "fourth drink" "was removed from him because he was incapacitated." (Id.) During the dinner at Rascal's, Plaintiff "took food out of his mouth and threw it at other people, including the pregnant spouse of a supervisor; (ii) made inappropriate comments and noises at the table; (iii) barked and growled at the table; (iv) inappropriately touched his supervisor, Tamela Velazquez; (v) leaned on Velazquez and fell off his chair; (vi) was unconscious at the table; and (vii) urinated in the public parking lot and . . . on a Verizon Wireless supervisor." (Id. ¶ 16.) Plaintiff "admits that he has no recollection of the events that took place during the dinner on December 14, 2007", and "has no reason to believe that his coworkers were not telling the truth . . . ." (Id. ¶¶ 14, 17.)

Plaintiff visited the emergency room on Sunday, December 16, 2007, and told the medical staff he was "[v]ery exhausted" and physically and mentally "fatigued." (Id. ¶ 32.) A blood test taken on December 16, 2007 "showed that Plaintiff had THC (tetrahydrocannabinol) in his system and no other drug." (Id. ¶ 34.)

Plaintiff's diagnosis was "consistent with alcohol and marijuana intoxication" and a "[h]angover." (Id. ¶ 33.)

Plaintiff returned to work on Monday, December 17, 2007, at which time Plaintiff sent the following email, with the subject line "Apologies," to the Verizon "leadership team and their spouses":

> Please accept my apologies for my unusual behavior at the Leadership dinner the other night. I was at a loss for why I behaved in such an unruly manner that I went to Kaiser on Saturday to have my blood checked for abnormalities; which, by the report, it did appear that I may have ingested something into my system.
>
> At this point all I can do is ask you all to accept my apologies.

(Id. ¶ 18; Nasser Decl. Ex. F.) Plaintiff also apologized "in-person to Donald Latimore" for "throwing food at Latimore's pregnant wife" and to his supervisor, Tamela Velasquez, for "touch[ing] her inappropriately." (SUF ¶¶ 20, 21.)

Verizon's policies concerning the consumption of alcohol and inappropriate behavior out of the office are codified in a guide entitled "Your Code of Conduct" ("Code of Conduct"). (Id. ¶ 3.) The Code of Conduct provides, in relevant part:

> Verizon Wireless employees are required to treat customers, fellow employees and vendors with respect, dignity, honesty and fairness. It is Verizon Wireless' policy that threatening, insubordinate, violent or obscene behavior by any employee will not be tolerated. Conduct that encourages or permits an offensive or hostile work environment will not be allowed . . . .
>
> Unprofessional behavior or prohibited conduct that is harmful to the company's performance will not be tolerated . . . .
>
> Although alcohol may be served at certain Verizon Wireless functions, events or business meetings if authorized by a department vice president or higher level senior manager, consumption at any such event

> is completely voluntary, should always be in moderation, and never in a manner that would embarrass or harm the company.

(SUF ¶¶ 5, 6; Nasser Decl. Ex. D.)

On December 19, Debria Hall ("Hall"), Director of West Area Operations and Velasquez's direct supervisor, "received an anonymous letter describing the events that took place at the December 14, 2007 dinner at Rascal's." (SUF ¶ 22.) Hall faxed the letter to Verizon Human Resources Associate Director Laura Wildemann and Human Resources Manager Veronica Browning ("Browning"). (Nasser Decl. Ex. L Hall Dep. 30:17-31:20.) On December 21, Verizon's Human Resources Department commenced an investigation, led by Browning, during which Plaintiff stated during an interview "he did not remember what happened [at the dinner] on December 14, 2007." (SUF ¶¶ 23-24.) "On January 3, 2008" Hall filled out and emailed to Browning a "termination or separation template" "recommending that [Plaintiff] be separated from Verizon." (Id. ¶ 25; Nasser Decl. Ex. L Hall Dep. 57:9-59:24.) The final approval for Plaintiff's termination was made on January 8 or 9, 2008. (SUF ¶ 26; Nasser Decl. Ex. L Hall Dep. 115:24-116:5.)

On January 10, 2008, Plaintiff presented Velasquez with a "Kaiser Permanente Visit Verification Form" which stated: "[Plaintiff] can participate in a modified work program starting 1/10/2008 and continuing through 7/10/2008. If modified work is not available, [Plaintiff] is unable to work for this time period." (SUF ¶ 35; Nasser Decl. Ex. G.) The form also stated that Plaintiff "may not operate a motor vehicle for at least 6 months." (Id.) Verizon then advised Plaintiff to "stay at home until [Verizon] could assess the parameters of his modified duty." (Id. ¶ 40.)

Hall and Browning called Plaintiff on January 15, 2008 and officially terminated Plaintiff's employment with Verizon. (Id. ¶ 26.) Hall and Browning "explained to [Plaintiff] that [Verizon's] investigation revealed he had violated [the Code of Conduct]. [They] explained that his behavior was offensive to the participants of the event as well as the servers and patrons of the restaurant." (Plt.'s Ex. 2, VZW ANT000149.)

Plaintiff alleges the following five claims in his first amended complaint: (1) disability discrimination in violation of California Government Code section 12940(a) ("FEHA"); (2) failure to make a reasonable accommodation in violation of FEHA section 12940(m); (3) retaliation for exercising rights under the CFRA; (4) violation of the CFRA; and (5) wrongful termination in violation of public policy.

II. LEGAL STANDARD

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). If this burden is satisfied, "the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56 [of the Federal Rules of Civil Procedure], specific facts showing that there is a genuine issue for trial." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotations and citation omitted). This requires that the non-moving party "come forward with facts, and not allegations, [that] controvert the moving party's case." Town House, Inc. v. Paulino, 381 F.2d 811, 814 (9th Cir. 1967) (citation omitted); see also Beard v. Banks, 548 U.S. 521, 527 (2006) (finding that a party opposing summary judgment who "fail[s] [to] specifically challenge the facts identified in the [moving party's]

statement of undisputed facts . . . is deemed to have admitted the validity of [those] facts . . . ."). "Mere argument does not establish a genuine issue of material fact to defeat summary judgment." MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993). "All reasonable inferences must be drawn in favor of the non-moving party." Bryan v. McPherson, 590 F.3d 767, 772 (9th Cir. 2009).

III. DISCUSSION

A. Disability Discrimination

Verizon seeks summary judgment on Plaintiff's disability discrimination claim, arguing Plaintiff cannot establish he suffered from a disability, cannot establish his termination was *because* of a disability, and cannot show that Verizon's legitimate reason for firing him was pretextual. (Mot. for Summ. J. 12:4-12.) Plaintiff counters that "a jury may infer that the behavior [Plaintiff] ultimately displayed at the work event was conduct resulting from his disability, and that Verizon knew that this behavior resulted from a medical physical or mental disability" when it terminated him on January 15, 2008. (Plt.'s Opp'n 2:14, 10:10-11.)

Claims for disability discrimination under FEHA are analyzed "under a three-step framework." Brundage v. Hahn, 57 Cal. App. 4th 228, 236 (1997). FEHA proscribes both "disparate treatment discrimination" and "disparate impact discrimination." Scotch v. Art Institute of California-Orange Cnty., Inc., 173 Cal. App. 4th 986, 1002 (2009). Plaintiff alleges disparate treatment discrimination.

> California uses the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination based on a theory of disparate treatment. This so-called McDonnell Douglas test reflects the principle that

> direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained. Under the McDonnell Douglas test, the plaintiff has the initial burden of establishing a prima facie case of discrimination.

Id. at 1004 (internal citations and quotations omitted).

> If this burden is satisfied, the employer must then offer a legitimate nondiscriminatory reason for the adverse employment decision. If the employer satisfies this burden, plaintiff bears the burden of proving the employer's proffered reason was pretextual. Plaintiff can establish a prima facie disability discrimination case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability.

Brundage, 57 Cal. App. 4th at 236 (1997) (internal citations omitted).

A disability includes a physical or mental condition which "limit[s] a major life activity," such as work. Cal. Gov. Code § 12926 (i), (k). Plaintiff indicates his disability is that he was drugged with marijuana by an unnamed individual and "the THC which was found in his blood . . . may have been the catalyst which began the manifestation" of symptoms of Plaintiff's "anxiety, depression, and/or bipolar disorder." (Plt.'s Opp'n 7:20-22.) However, Plaintiff has not presented evidence from which a reasonable inference could be drawn that he was drugged with marijuana; nor has he presented evidence suggesting that marijuana consumption is capable of triggering symptoms of his stated disabilities. Plaintiff's evidence opposing the motion includes a declaration from his physician Doctor Linda Baryliuk in which this physician avers: "substance misuse does not cause bipolar disorder." (Baryliuk Decl. ¶ 5.) Further,

Plaintiff has not presented evidence showing he was ever diagnosed with bipolar disorder; nor has Plaintiff controverted the evidence showing Plaintiff's behavior was the result of alcohol consumption with evidence permitting a reasonable inference that his behavior at the dinner was caused by symptoms of bipolar disorder, anxiety, or depression.[1] Since Plaintiff has not shown he "suffers from a disability," he has failed to establish a prima facie case of disability discrimination. Brundage, 57 Cal. App. 4th at 236.

Assuming *arguendo* Plaintiff met his burden of establishing a prima facie case of disability discrimination, Plaintiff has not demonstrated that Verizon's reason for terminating Plaintiff was pretextual. Verizon has presented evidence showing that Plaintiff was terminated because his behavior at the December 14, 2007 dinner violated its Code of Conduct, which is a reason Plaintiff acknowledged in his deposition testimony as follows: "Q: "Why were you terminated from Verizon? A: Because of my inappropriate behavior." (Nasser Decl. Ex. B Anthony Depo.; see also Plts.' Ex. 2, VZW ANT000149 (documenting phone call in which Plaintiff was told he was terminated for violating Code of Conduct).) Plaintiff has not countered with evidence from

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[1] Plaintiff relies in his opposition on significant portions of depositions that have not been presented by either party. (See, e.g., Plaintiff's Opp'n 5:27-6:5; 9:20-28; 11:1-7; 16:16-20; 17:20-25; 19:1-9; 21:26-22:21; 23:4-23, relying on portions of Doctor Soonjae Kwon, Doctor Linda Baryliuk, Christine Clark, Reuben Gonzalez, Daniel Hess, and Debria Hall's depositions that are not part of the summary judgment record.) Plaintiff's ex parte application to offer additional evidence was granted over the objection of Verizon, and the briefing schedule was extended accordingly (Docket No. 22); yet Plaintiff has failed to offer an explanation for the absence of the deposition evidence cited throughout his opposition. Since "[t]he document[s] on which [Plaintiff] relies . . . [were] not submitted as part of the summary judgment record, [the Court will] not consider [them]." In re Citric Acid Litig., 191 F.3d 1090, 1101-02 (9th Cir. 1999).

which a reasonable inference could be drawn that Verizon's reason for firing him was pretextual. See Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 357 (2000) (explaining that after an employer proffers a legitimate reason for its employment action, the employee must "point[] to evidence which nonetheless raises a rational inference that intentional discrimination occurred"); Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1095-96 (9th Cir. 2005) (circumstantial evidence "must be 'specific and substantial' to defeat employer's motion for summary judgment"). Therefore, Verizon's motion for summary judgment on Plaintiff's disability discrimination claim is granted.

B. Reasonable Accommodation

Verizon also seeks summary judgment on Plaintiff's reasonable accommodation claim, arguing Plaintiff "cannot establish the existence of a disability [and he] fails to establish any specific need or request for an accommodation." (Mot. for Summ. J. 17:7-9.) Plaintiff counters his "doctors ordered a 'modified' work schedule, the contours of which could have been more thoroughly developed had Verizon not immediately fired him." (Plt.'s Opp'n 11:24-26.)

Under FEHA, it is unlawful for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an . . . employee." Cal. Gov. Code § 12940(m). "The elements of a failure to accommodate claim are (1) the plaintiff has a disability under FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability." Scotch, 173 Cal. App.4th at 1009-10.

Plaintiff has not shown that he "has a disability under FEHA." Id. Further, Plaintiff has not alleged in his complaint nor

stated in his opposition what accommodation he did not receive. It is undisputed that Plaintiff's January 10, 2008 "Kaiser Permanent Visit Verification Form" stated Plaintiff must either participate in a modified work schedule or not work at all. (SUF ¶ 35; Nasser Decl. Ex. G.) However, the form did not clarify the contours of the "modified work program." The form also stated that Plaintiff "may not operate a motor vehicle for at least 6 months"; however, Plaintiff "admits this is not an 'essential function of the job held'" and does not argue Verizon failed to accommodate this aspect of Plaintiff's disability. (Plt.'s Opp'n 12:14-15.) When Plaintiff was contacted by one of his supervisors on January 11, 2008, Plaintiff "stated that he didn't know what the doctor meant by modified work duty." (Plt.'s Ex. 5 VZW ANT000719.) It is undisputed that Verizon then advised Plaintiff to "stay at home until [Verizon] could assess the parameters of his modified duty." (SUF ¶ 40.)

"It is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee." Jensen v. Wells Fargo Bank, 85 Cal. App. 4th 245, 266 (2000). "[A]n employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it." King v. Untied States Parcel Serv., 152 Cal. App. 4th 426, 443 (2007). "[I]f a plaintiff wants [his] employer to consider the specific nature of [his] disability in crafting an accommodation, the burden rests on the plaintiff to inform the employer of those restrictions . . . . An employer cannot accommodate an employee's disability if it does not know how that disability affects the employee. In this case,

Defendant accommodated Plaintiff as best it could by placing [him] on disability leave." Goos v. Shell Oil Co., 2010 WL 1526284, *12 (N.D. Cal. 2010). Since Plaintiff has not shown he has a disability under FEHA or that Verizon failed to reasonably accommodate his disability, Verizon's motion for summary judgment on Plaintiff's reasonable accommodation claim is granted.

C. Retaliation Under the CFRA

Verizon also seeks summary judgment on Plaintiff's retaliation claim, arguing Plaintiff "cannot establish any causal nexus between his request for CFRA leave and his termination from employment." (Mot. for Summ. J. 18:25-26.) Plaintiff counters "instead of granting [Plaintiff's] requested leave, [Verizon] terminated him." (Plt.'s Opp'n 15:2.)

"CFRA generally provides that it is unlawful for an employer to refuse an employee's request for up to 12 weeks of 'family care and medical leave' in a year. An employer is also forbidden from discharging or discriminating against an employee who requests family or medical leave." Gibbs v, Am. Airlines, Inc., 74 Cal. App. 4th 1, 6 (1999) (citing Cal. Gov. Code § 12945.2(a)). To prove "retaliation in violation of CFRA" a Plaintiff must show: "(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised [his] right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action . . . because of [his] exercise of [his] right to CFRA leave." Dudley v. Dep't of Transp., 90 Cal. App. 4th 255, 261 (2001).

The parties do not dispute that Verizon and Plaintiff are each covered by the CFRA and that Plaintiff exercised his right to

request leave under the CFRA; rather, they dispute whether Plaintiff was fired *because of* his request for leave. Plaintiff argues the "temporal proximity" of his request and termination shows he was fired for filing his CFRA claim. Plaintiff argues he submitted his CFRA claim on January 9, 2008 and that the decision to terminate him was not made until January 10, 2008 or later. (Plt.'s Opp'n 19:19-20:4.) However, Plaintiff has not submitted evidence from which a reasonable inference could be drawn to support this chronology. Plaintiff has not countered Verizon's evidence showing that it was not aware of Plaintiff's CFRA claim until January 10. (SUF ¶ 35; Nasser Decl. Ex. B Anthony Depo. 125:22-126:10; Nasser Decl. Ex. F.) Plaintiff presents a letter from MetLife Disability to Plaintiff dated January 9, 2009; however, this letter does not show that officials at *Verizon* were aware of Plaintiff's CFRA claim. (Plt.'s Ex. VZW ANT000794; see also Nasser Decl. Ex. K Gonzalez Depo. ("MetLife will make th[e] determination" whether to grant FMLA or CFRA leave).) Further, Plaintiff has not countered Hall's deposition testimony that "the final approval . . . for [Plaintiff's] termination" came on "either the 8th or 9th of January" while she was in "a two-day leadership meeting." (Nasser Decl. Ex. L Hall Depo. 115:24-116:5.) Lastly, it is undisputed that Browning asked Hall to prepare a template recommending Plaintiff's termination, and that Hall prepared it on January 3, 2008, after Browning had "concluded all of the investigation" with the exception of "a couple more calls [including to] Rascal's [restaurant]." (SUF ¶ 25; Nasser Decl. Ex. L Hall Depo. 57:9-59:24.) Further, whether Verizon waited until January 8 or 9 to make the final decision to terminate Plaintiff is insufficient to create an inference of retaliation since the uncontroverted evidence

shows Verizon was investigating whether Plaintiff should be terminated before those dates. See Clark Cnty. Sch. Distr. v. Breeden, 532 U.S. 268, 272 (2001) (finding employer's knowledge of a lawsuit prior to transferring employee "immaterial" to retaliation claim "in light of the fact that [the employer] was contemplating the transfer before it learned of the suit" and "proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality").

Plaintiff also argues "derogatory comments about the protected activity" show he was fired for filing his CFRA claim. (Plt.'s Opp'n 21:6-15.) Plaintiff presents emails sent between human resources staff members dated January 10 and 14, 2008, which state "[Plaintiff] called me claiming that his doctor has him out on disability" and, "Is [Plaintiff's] doctor aware of what his job entails?" (Plt.'s Ex. 6 VZW ANT000720, 732.) However, Plaintiff has not sufficiently explained how these statements are derogatory or how they support an inference of retaliation. Lastly, Plaintiff argues Verizon has an "unspoken policy of retribution for taking medical leave." (Plt.'s Opp'n 27:3-4.) However, Plaintiff supports this argument by citing to portions of his deposition that have not been presented to the Court and are therefore not part of the summary judgment record. See In re Citric Acid Litig., 191 F.3d at 1101-02 (declining to consider evidence not submitted as part of summary judgment record). Since Plaintiff has failed to raise a genuine issue of material fact that he was retaliated against for filing his CFRA claim, Verizon's motion for summary judgment on this claim is granted.

D. CFRA

Verizon seeks summary judgment on Plaintiff's CFRA claim, arguing Plaintiff was not entitled to protection from termination "for reasons not related to his CFRA claim." (Mot. for Summ. J. 20:4-15.) Plaintiff responds "Verizon did not fulfill its obligations under CFRA of guaranteeing [Plaintiff] a position" after he took leave under CFRA. (Plt.'s Opp'n 3:5-7.) "[A]n employee who requests CFRA leave or is on leave 'has no greater right to reinstatement or other benefits and conditions of employment' than an employee who remains at work." Neisendorf v. Levi Strauss & Co., 143 Cal. App. 4th 509, 519 (2006) (quoting California Code Regs. title 2, § 7297.2(c)(1)). "For this reason, even though [Plaintiff] took CFRA leave, [Plaintiff] had no greater protection against [his] employment being terminated for reasons not related to [his] CFRA request than any other employee at [Verizon]." Id. Since Plaintiff has failed to present evidence sufficient to permit drawing a reasonable inference that Verizon's stated reason for firing him was pretextual, Plaintiff has "failed to establish the requisite causal connection between [his] protected actions in taking [] CFRA . . . leave and the termination of [his] employment." Id. Therefore, Verizon's motion for summary judgment on Plaintiff's CFRA claim is granted.

E. Wrongful Termination in Violation of Public Policy

Verizon also seeks summary judgment on Plaintiff's wrongful termination in violation of public policy claim, arguing since Plaintiff's underlying claims fail, "then so too must his claim for wrongful termination in violation of public policy." (Mot. for Summ. J. 20:23-25.) Plaintiff counters he has stated viable claims under the CFRA and FEHA, and therefore he has stated a wrongful termination

in violation of public policy claim. (Plt.'s Opp'n 30:27-31:2.) "The parties . . . agree that if Plaintiff's discrimination claims fail, [his] claim for wrongful termination in violation of public policy also fails." Sanchez v. Corr. Corp. of Am., 2006 WL 3531735, *9 (E.D. Cal. 2006). Since Plaintiff has failed to raise a genuine issue of material fact with respect to his FEHA and CFRA claims, his wrongful termination claim also fails. See Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 229 (1999) (stating "because [Plaintiff's] FEHA claim fails, his claim for wrongful termination in violation of public policy fails").

IV. Conclusion

For the stated reasons, Verizon's motion for summary judgment is granted. This action shall be closed.

Dated: August 27, 2010

GARLAND E. BURRELL, JR.
United States District Judge